

3440. Adulteration of Mulford's wintergreens. U. S. v. 4 Wooden Boxes of Mulford's Wintergreens. Tried to the court and jury. Verdict for the Government. Decree of condemnation, forfeiture, and destruction. (F. & D. No. 5232. I. S. No. 12606-e. S. No. 1823.)

On or about June 10, 1913, the United States attorney for the Northern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 4 wooden boxes, each containing 36 small tin boxes of Mulford's wintergreen confectionery, remaining unsold in the original unbroken packages in Albany, N. Y., alleging that the packages had been transported from the State of Pennsylvania into the State of New York, and charging adulteration in violation of the Food and Drugs Act. The shipping containers were branded: "Walker and Gibson, Albany, N. Y.—Glass—from H. K. Mulford Co. Chemists, Phila., New York, Chicago, Minneapolis." The retail packages were labeled: "Mulfords Wintergreens, H. K. Mulford Co., Chemists, Phila.—aid digestion, sweeten the breath, other flavors, violets, mints, aromatics, H. K. M. Co.—Mulford wintergreens 5c. Aid digestion, sweeten the breath, H. K. Mulford Co. Chemists, Philadelphia 51289."

Adulteration of the product was alleged in the libel for the reason that it contained 5.49 per cent of talc, the said talc being an ingredient deleterious and detrimental to health, and the use of it being forbidden by law in the manufacture of confectionery. On March 10, 1914, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court (Ray, J.):

Gentlemen of the jury, this is a proceeding by the United States under the law known as the Pure Food and Drugs Act to condemn these four wooden boxes of wintergreens that you heard described. This law that you are called upon to enforce here, if it has been violated, and the Government contends that it has, is a wise law, an efficient law, enacted for the good of the people, all the people, the protection of trade, commerce, and individuals. No juror under his oath, no judge on the bench, has any right to question it or its wisdom, because when I take my seat here it is under a solemn oath that I will enforce the law as I find it and, of course, construe it. You take a solemn oath that you will enforce the law as you find it laid down to you by the court, and therefore you have nothing to do with the construction of the law or ordinarily with the meaning of it. It is for you to say what the facts are under the law as given. So, gentlemen, that simplifies this case so far as you are concerned very much.

Now, gentlemen, wintergreen they tell you is a drug. A stick of wintergreen candy which you buy for your child you would hardly call a drug. It would have a drug in it of course, if it had any of the oil of wintergreen to give it taste, and so the oil of peppermint or the essence of peppermint is a drug. But if you should purchase a stick of peppermint candy in the candy shop, or as they say a confectioner's shop, as in polite society they would speak of it, you would hardly say that the stick of peppermint candy was a drug. It contains a drug. However, gentlemen, should it appear that peppermint, wintergreen, or horehound candy, which has horehound in it, was made, manufactured, sold, and administered by doctors for medicinal purposes for the cure of disease, the alleviation or mitigation of disease, if that was the purpose in its manufacture and sale, even though there is a large amount of sugar and but a trifle of this essence or oil in it, why, then, of course, it would at once be taken out of the category of condiments and confections and would take its place in the category of drugs.

Now, Congress when it enacted this law undertook to define, so far as it reasonably could, a drug, a food, as the words are used in the act, and indicate what may be or may not be a confection as distinguished therefrom. Of course, the dictionary says that a confection may be a sweetmeat, any of the sweetmeats that a confectionery makes or sells, such as candy or other articles made of sugar, sirup, honey, or like anything of that nature. Of course, you all know that to make these candies, etc., distinguishable from the sugar which is the chief part of them they use various oils, such as wintergreen, peppermint, spearmint, and other things. You have been acquainted, of course, during boyhood and in childhood with peppermint candy and all those things.

Now, a confection may be defined to include an article produced by the mixing or compounding of sugars, sweets, etc., for pleasing the taste mainly. Of course you know well enough, and you don't need any doctors here to tell you, that sugar is an article of food. They might bring all the doctors in the United States to swear to you that sugar was a drug and you wouldn't believe it, and I wouldn't believe it. Of course, sometimes it comes under the head of drugs, when it is used with other things, for medicinal purposes mainly. It is then used as a drug, but of itself it is not a drug. When it is put up and changed over in certain forms it is then a sweetmeat or a confection. When it is used in connection with other things for medicinal purposes and something is mixed with it, it becomes for the time being not a drug of itself, but in the use that is made of it, the compound, a drug.

"The term 'drug,' as used in this act, shall include" (I read it to you yesterday; I will read it again) "all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use." That is, it must either be a medicine or a preparation recognized in the book. Of course as to these wintergreens, there is no pretense here that that particular composition is recognized in the United States Pharmacopœia, to which your attention has been called, as used in that section. That preparation is not mentioned or recognized there. Therefore, you must determine, gentlemen, what it is. Of course it is intended for internal use, but it is not recognized here; therefore it is not included here under this definition as a drug, unless it is a drug for other reasons. And it further says, "and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals." I will read that again: "and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals."

The defendant contends here that these wintergreens, these tablets, are a drug within the meaning of this act, for the reason that they may be used to sweeten the breath. Well, that, gentlemen, I will say to you as a matter of law, will not make that composition a drug within the meaning of the law. They claim they "aid digestion," and they explain why, by the use of the wintergreen, not the sugar; they don't claim that the sugar or the talc or whatever mineral oils there are in there, but the oil of wintergreen would aid digestion or alleviate indigestion. To be correct, cure indigestion; that the wintergreen would assist the stomach in getting rid of the gases produced by indigestion, and for that reason the tablets may be regarded as having a medicinal property. That is the contention of the defendant; that it is a drug, because the defendant says it is a mixture of substances, to wit, 93 parts of sugar, 5 parts of soapstone or talc, one-half of 1 part mineral oil, some starch, one-eighth of 1 part of the oil of wintergreen, and that the presence of that one-eighth of 1 part out of 100 parts, regarding that as divided up into 100 parts, and then you take 1/100 of that and divide that into 8 parts, one of those 8 parts you can see would represent the wintergreen that is in there.

Mr. Dowd. One of those 800 parts.

The COURT. One-eighth of 1 of those parts. Now, if that is cut into 100 pieces you would have a representation of 100 parts, and one-eighth of 1 part, the evidence is, is oil of wintergreen. Therefore, if it was reduced, taken out, and separated and put in a solid, compared with that it would be one-eighth of 1/100 certainly, unless mathematics have changed, so it would be 1/800 of the whole, so that if you could so cut that up that fraction would show you a solid mass of oil of wintergreen. Now, counsel for the Government points to the fact that the Pharmacopœia of the United States specifies as a dose for medicinal purposes 16 drops, and they have given you the evidence as to the infinitesimal part of that dose that is represented in one of these tablets. I think the evidence tends to show that it would take some five boxes to get a dose; that you would have to eat five of these boxes of tablets before you would have a dose. Now, the United States attorney, the Government, says that that demonstrates to you, or should demonstrate, the fallacy of the contention by the defendant that this was ever intended as a medicine or for medicinal purposes or to be used as a drug for the cure or the mitigation of any disease or diseases. That it demonstrates it because recognized authority says you would have to take 16 drops—I think that is right, if I am wrong you can correct me—that you would have to eat five boxes of these tablets to get a dose, and the only purpose they point out of the wintergreen is to aid and cure indigestion, and they say if you had to take five boxes of that sugar, pure sugar with the mixture of soapstone, which is talc, that instead of aiding your digestion or the digestion of a man who had

indigestion that it would aggravate the disease, and that if he did not have indigestion before he certainly would have after he took the medicine. Of course, I mention that to you gentlemen as bearing on the reasonableness or unreasonableness of these contentions that have been put forward here by the respective parties as to what this is, what it was intended for, whether as a medicinal preparation, as a mixture of substances intended to be used for the cure or mitigation or prevention of disease of either man or other animals. Was it made and intended for that purpose and put on the market for that purpose, or was it made and put on the market as a confection and for the purpose of confectionery; that is, sugar, sweetmeats with certain additions, wintergreen in some cases and peppermint in others, because it is sweet and pleasant to the taste, and these various ingredients do make it more pleasant to the taste and more agreeable to the throat and all that sort of thing? Now, which was it?

If you find, gentlemen, under this evidence that this was a mixture of substances intended to be used and put on the market and sold for use for the cure, mitigation, or prevention of disease of either man or other animals, why, then, of course, gentlemen, you should find that it is not a confection, and then it would not be adulterated within the meaning of the act as applied to confectionery, because the act says: "In the case of confectionery, if it contain terra alba, barytes, talc"—I don't need to name the others—talc or spirituous liquors, etc., then it is adulterated. Of course, gentlemen, a mere trace of talc found in there accidentally or put there for some other purpose would not make it adulterated within the meaning of the law, but this is not a trace; it is 5 parts out of 100, and it is a material part, I will tell you as a matter of law. So that, gentlemen, if you find that these wintergreens are a confection within the definition of confectionery, as you have heard it given, then I tell you, as a matter of law, it will be your duty to find a verdict in favor of the Government for the condemnation of these four wooden boxes of wintergreens, because it is plainly, as a matter of law, within the condemnation of the act.

This is not a criminal case, gentlemen. This is not an attack upon these estimable gentlemen here in this city, men of the highest character, Walker & Gibson. This is not an attack on them, no reflection on them, nor intended to be. If the law is to be enforced it does not make any difference where the Government finds these impure and deteriorated articles, whether they find them in a barroom, in a cigar store, a drug store in this city, or in your parlor or mine, if it is a violation of the law for it to be made and put on the market at all, why, then, wherever found, whether it is found in the barn of the poor man or in the parlor of the rich man, it is equally a violation of the law, because it is the quality of the thing that condemns it, and not the character of the man who happens to be handling it. Of course, there is not the slightest evidence here that these gentlemen, these druggists, knew that they were handling something condemned by the law, not a particle of evidence to that effect. But that does not lessen your duty or mine if you find and believe on this evidence that this was a confection and not a drug. It is not the question of intent on these gentlemen's part at all. It is, What is the article? Of course there is a law against impure liquors and all that sort of thing.

Now, to illustrate: Of course, if liquor that is put on sale is a composite of poison, no pure liquor about it at all, but somebody is making it and sending it out and getting it on the market, of course, if they should find it in a low-down saloon here in Albany and seize it and try and condemn it, nobody would object, unless it were some particular citizens whose stomachs were so hardened that they would not appreciate a good drink and who wanted liquor with a bite and sting like a serpent; that would be the only liquor they would appreciate; they would be the only ones that would object to it being seized and destroyed as offensive to the law. But if by any imposition on you or I or Mr. Dowd or these other gentlemen, some one should sell you that liquor and you should take it home and the Government officers should come along and see it and find it on your sideboard, however much we might dislike to have it found there and taken away, we would probably thank our Government that it was discovered and removed. But it would be just as much their duty to seize it when found on our sideboard, don't you see, as it would to take it from the lowest saloon in the most degraded hamlet in the land. I merely mention that to illustrate our duty and why the enforcement of this law is not an impugning of the honesty or the integrity of any man or even of the manufacturer of the article necessarily. Of course, if the manufacturer knows and appreciates that he is violating the law and he does that, what he makes is subject to seizure and con-

demnation, not because he intended to violate the law, however, but because he makes the article which he does. If he were prosecuted criminally, of course, then his knowledge, intent, and purpose would be very material; but when you proceed simply against the property itself to condemn it, it is not the intent or the purpose—wrongful intent or purpose—of the manufacturer which is in issue, but it is the quality of the article which is made. Is it of a quality and character which violates the statute? If so, then it is not only the right but the duty of the Government to seize it. So that is this case. It is not a question whether these gentlemen who made this—Mulford & Co.—intended to violate the law. Did they violate the law? That is, did they make an article of confection and put it on the market which is forbidden; that is, if this is a confection made up of sugar, with a trace of wintergreen, one-half of one part mineral oil, a trace of starch, and five parts of talc—if they did that and put it on the market and it is an article of confection, then it is an article forbidden by the law and should be condemned in this proceeding. I tell you, gentlemen, it is entirely immaterial, if this is a confection and you so find, whether or not the talc may be injurious to health, because in that regard it is entirely immaterial, so far as the application of the law to this case is concerned, whether the confection is deleterious to health or not, because that section which I have read to you forbids absolutely the putting of talc into an article of confectionery. Of course, I have told you that that means an appreciable amount, and I have told you further that 5 parts in 100 in one of these little tablets is a material amount and sufficient to make it subject to condemnation if you find that is what it is.

Now, then, gentlemen, as to what this is, what it was made for and intended for, quoting the language of the act, "a substance or mixture of substances intended to be used," etc., the Government contends that these tablets were never intended to be used as a drug or a medicine or for the prevention or the cure of disease; that if they had been they would have been listed in this book that you have seen here. But they are not; they were put on a separate little paper, which has not been produced. And then the Government says that Mr. Mulford, the vice president, I think it was, wrote this letter—the vice president of the company, who was there managing it—that he wrote and said, referring to these wintergreens: "Trusting that this information will enable you to bring the matter of shipment of these various confections up to the proper classification bureau," etc., and that that is an admission on his part, made November 14, 1912, that these wintergreens which he specially mentions are confections; that they had been thinking about the law and knew of it; and that when he made that admission he spoke advisedly. It is for you to say. I submit it to you, as part of the evidence in this case, what they were manufactured for. What was that mixture made for and intended to be used for and put on the market for? Was it something to be used for the cure, mitigation, or prevention of disease or for common consumption, to take in your pocket and have one in your mouth because pleasing to the taste and sweet, just as you would have a licorice drop or a piece of candy, or something of that sort, or a gumdrop on your sideboard. These things I have mentioned last are confections, it is true.

Then, here, again, gentlemen, the Government calls attention to these shipping bills, etc., made out as you have heard described, and the Government contends that here was a straight admission on the part of this defendant company February 8, 1913, February 5, 1913, February 28, 1913, and February 7, 1913, when they made shipments of these wintergreens; they had stamped on there "Confectionery in tin, invoice value not exceeding 15 cents a pound." I think the stamp on there is the same; it reads the same in every case, so I do not need to go over that again. That after these dates and prior to April 15, 1913, when these tablets were shipped, that some of these were seized in a cigar store by the Government, and that gave them notice, and they went right on shipping them, but they changed their shipping bill and left off that designation "confectionery in tin," etc., and that accounts for this one shipping bill.

Now, gentlemen, it is for you to say was that an admission? Were those stamps characterizations? Did they speak the truth at the time they were made, and did they show the purpose for which those tablets were actually made and put upon the market—that is, whether it was a mixture of substances made and intended to be used and put on the market to be used and sold as a confection or as a drug or a medicine?

That is about all there is of this case for you to decide. If you find that it was a confection, then you find for the Government for the condemnation of

this property. If you find, on the other hand, it was made and put on the market, manufactured, and sent out and intended to be for the cure or mitigation or prevention of disease of either man or other animals, then, of course, it will be your duty here to find a verdict for this defendant.

Your requests to charge there I have covered, and I give you an exception where I refused to charge as requested.

Mr. HEPBURN. Will your honor give me an exception to such requests as you have not charged?

The COURT. Neither of you claim that these tablets were ever put out or intended to be put out or intended to be used as an article of food, do you?

Mr. HEPBURN. Unless you class confectionery under the head of food, as is done in the act.

The COURT. Oh, no; confectionery is not an article of food within the meaning of this law.

Mr. HEPBURN. I think the law says it is an article of food.

The COURT. It does?

Mr. HEPBURN. Yes.

The COURT. It says that it is?

Mr. HEPBURN. Yes.

The COURT. Where?

Mr. HEPBURN. "The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man." You see it is mixed up there.

The COURT. That isn't it. This tells when these things are adulterated. In the case of drugs. In the case of confectionery. In the case of food. That is where it makes a distinction.

Mr. HEPBURN. I mean the definition of food covered confectionery.

The COURT. As excluded from that you don't claim that it is a food? You claim it is either a drug within that provision or confectionery.

Mr. HEPBURN. My claim is that it is a drug, and their claim is that it is confectionery.

The COURT. You don't want me to talk about this question of food. You know what a food is, don't you? Beefsteak would be a food; crackers would be a food; chickens would be a food in that sense of food, because there are provisions here: "In the case of food." There is no contention here that any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength?

Mr. HEPBURN. No.

The COURT. Because if you want me to come to that and hold it a food I shall direct a verdict against you on the instant.

Mr. HEPBURN. We don't claim it is a food.

The COURT. If you do, then I say that this talc, which is 5 parts to 100, would be just the same as though you had put 5 parts of sand into your sugar. If you want me to I will do it.

Mr. HEPBURN. No; I am speaking of the proposition that this is used for the purpose of—

The COURT (interrupting). I have given my charge on the proposition just as you two gentlemen have tried the case. If the jury find it is a drug, then, of course, their verdict will be for the defendant. If they find it is a confection, then, of course, they have got to find under my charge and instructions for the Government and condemnation. Any further requests?

Mr. DOWD. Nothing only that the jury be permitted to take these exhibits.

The COURT. Of course.

Mr. HEPBURN. I withdraw the fourth request. I want to ask for an exception to that portion of your honor's charge in which you charged the jury to the effect that if they find it to be a confectionery that it was adulterated in the meaning of the act.

The COURT. Yes; I have told them that as a matter of law, that that adulteration was sufficient and brings it within the law and subjects it to condemnation regardless of whether the talc was injurious to health or not. Congress had the right to say that.

Mr. HEPBURN. I don't want to seem fractious [captious?], but will your honor give me a general exception?

The COURT. It wouldn't do you any good.

Mr. HEPBURN. Then I would like an exception to that portion of your honor's charge in which you charge that the adulteration of five parts talc was a material adulteration.

The COURT. Yes; I charged it was sufficient and that it subjected these tablets to condemnation if found to be a confection. I will give you an exception to that.

Mr. HEPBURN. I would like an exception also to that part of your honor's charge in which you charge in regard to a dose amounting to 16 minims or 16 drops of wintergreen. You said that to make a dose of wintergreen they would have to take 16 drops.

The COURT. No; I said there was evidence here of that, that the book said that.

Mr. HEPBURN. It was merely a comment on the testimony?

The COURT. It was merely a comment on the testimony. Mr. Dowd called attention to that on the proposition and he claimed that taking that book to show what a dose is that is what he contends here, and I called the jury's attention to that, that in order to get a dose to help your digestion you would have to eat five boxes of these tablets. Of course they contend on their side that if a man had a little attack of indigestion and he wanted to cure it he would have to eat five boxes of these tablets with the sugar and talc, if he took a dose, and instead of helping his digestion it would be likely to give him indigestion; that is, if he didn't have it before.

Mr. HEPBURN. Will your honor grant me an exception to that?

The COURT. I will give you an exception to that.

Mr. HEPBURN. Can the jury take some of the boxes out with them; both with and without the talc?

The COURT. Why do you want them without the talc?

Mr. HEPBURN. So they can see them and examine them?

Mr. DOWD. Are they in evidence? They are not in evidence.

Mr. HEPBURN. We will take those that you put in evidence.

Mr. DOWD. If you will concede that ours have been manufactured for six years without talc they may take them. We have produced some of Park & Tilford's tablets without talc.

Mr. HEPBURN. I want to give them tablets both ways, with and without the talc, so that they can see the difference, just how these things are. It gives the jury a clearer idea of what the thing is.

Mr. DOWD. We don't care. They can take all these if they want to.

The COURT. Well, gentlemen, all I can say to you on that is you can take them; some have talc and some don't; I don't know as you can tell which is which.

Mr. HEPBURN. The ones with the word "Mulford" on have talc in and the ones without "Mulford" on have no talc in.

The COURT. Why don't you print your name on those [indicating]?

Mr. HEPBURN. We can't print it on those without the talc. We haven't discovered as yet how to do it.

The COURT. You make them both ways?

Mr. HEPBURN. This is our new construction since the time these were seized. Those without talc have no "Mulford" on the tablet.

The COURT. Well, gentlemen, they want you to see the one they have made since this seizure was made and which don't have any talc in. There [indicating] it is. You will find it in there. It don't have the word "Mulford" on. It has "Mulford" on the box, but not on the tablets; that is the point.

In the condition of my voice, gentlemen, have I made myself plain and clear to you in my charge? If there is any obscurity about any of it tell me, because it has been with an effort that I speak and in a sort of broken way, but I have tried to make it intelligible to you. If I have not, call my attention to it. Anything further?

Mr. HEPBURN. No; that is all

The COURT. You may retire, gentlemen, and you can simply say here by your verdict: We find for the Government, which will be adequate, and you can add to it.

Mr. HEPBURN. Yes; the necessary condemnation.

The COURT. Or for the defendant. You may retire.

The jury thereupon retired, and after due deliberation returned into court with a verdict in favor of the Government for condemnation of the property, finding that such property was not a drug or medicinal preparation, but confectionery, and that it contained a substantial amount of talc. Thereupon the H. K. Mulford Co., claimant, moved for an order setting aside the verdict of

the jury and directing a new trial upon the grounds that the verdict was contrary to the law and to the evidence and unsupported thereby; also upon the exceptions taken to the admission and rejection of evidence during the trial and the rulings made thereon and on the exceptions to the charge as recorded, which motion was denied by the court and to which ruling said claimant company excepted.

On March 31, 1914, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product should be destroyed by the United States marshal and that the libelant should have judgment for the costs of the proceedings, taxed at \$136.70.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3441. Adulteration of raisins. U. S. v. 70 Cases of Raisins. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 5350. I. S. Nos. 3568-h, 3569-h, 3574-h, 3575-h. S. No. 1958.)

On October 14, 1913, the United States attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the district court of the United States for said district a libel for the seizure and condemnation of 70 cases of raisins, 58 of which each contained 36 cartons and 12 of which each contained 45 cartons, remaining unsold in the original unbroken packages at Philadelphia, Pa., alleging that the product had been shipped on or about September 24, 1913, and transported from the State of West Virginia into the State of Pennsylvania, and charging adulteration in violation of the Food and Drugs Act. Fifty-eight of the cases were labeled: "36—Choice Cartons—California Seeded Raisins—Good eating brand—Consumers Fruit Co., Fresno, Cal." The cartons therein were labeled: "Good eating California seeded raisins—Packed for Consumers Fruit Co., California—Seeded by machinery—California seeded raisins—Absolutely clean." Twelve of the cases were labeled: "45 Choice Cartons—California Seeded Raisins—Packed at Fresno, California—Consumers Fruit Packing Co., California." (The cartons therein were labeled): "Seeded Raisins—Packed for Consumers Fruit Company, California—Three Roller Process Seeded Raisins—Guaranteed under Serial No. 7791—the Food and Drugs Act, June 30, 1906."

Adulteration was alleged in the libel for the reason that said article of food, to wit, raisins, consisted in whole or in part of a filthy and decomposed animal substance. Adulteration was alleged for the further reason that said article of food, to wit, raisins, consisted in whole or in part of a filthy and decomposed vegetable substance.

On May 1, 1914, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered and it was ordered by the court that the product should be destroyed by the United States marshal.

D. F. HOUSTON, *Secretary of Agriculture.*

WASHINGTON, D. C., *September 24, 1914.*

3442. Adulteration of canned tomatoes. U. S. v. 500 Cases of Canned Tomatoes. Consent decree of condemnation, forfeiture, and destruction. (F. & D. No. 5358. I. S. No. 5437-h. S. No. 1962.)

On October 21, 1913, the United States attorney for the Eastern District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 500 cases, each containing two dozen cans of tomatoes, remaining unsold in the original unbroken packages at St. Louis, Mo., alleging that the